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IN THE

Supreme Court of the United States

OCTOBER TERM—1967

No. 837

LEONARD ROYALL AIKEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONER LEONARD ROYALL AIKEN

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The prosecution has misstated not only the question presented but also the facts on Point I concerning the contamination of the entire jury. The question on Point I is not only whether the defendant was deprived of a fair trial but whether the defendant was deprived of effective representation of counsel during the trial manifested by the conduct of juror #9 and the other jurors who engaged in a "Roman holiday" at the expense of the defendant. Further, what material is contained in the 2 sealed letters submitted to the judge in the Southern District of New York, which letters are still sealed? The voir dire requested was first of juror #9 and then of the entire jury. The Court promised a voir dire (Tr. 829)

but in secret session, without the defendants being present, without counsel present, and without the contents of the letters being divulged nor questions directed to juror #9 as to the contents of the letters, the Court asked the direct question of whether juror #9 had influenced the other jurors. The Court avoided any question as to the 2 letters and their contents and it was juror #9 who wrote the letters. If the Court had granted the right of all counsel to cross examine juror #9 and also to examine the sealed letters in the presence of defendants the result could well have been different. The discontinuation of the trial appeared evident (p. 13, Petitioner's Brief). Since juror #9 could not be examined or cross examined by counsel although requested then no showing of prejudice could be shown but the Court confirmed prejudice when it stated in chambers on this very point:

> "The Court: I wouldn't be at all surprised if all the jurors have the same opinion. But I have been trying to the best of my ability to control what goes on in this courtroom but I can't do it when I don't get cooperation from all counsel."

When the Solicitor General argues that initial examination failed to furnish any support whatsoever for the speculation that the others had been influenced. The word "speculation" is substituted for the word "actuality." The judge confirmed the "Roman Holidays," the lawyers and conduct of the jurors confirmed the same and 2 sealed letters stamped the case verdict before deliberation. The balance of the trial of 2½ weeks was for or without substance.

Whether it is a judge, a marshall, a bailiff or another juror who influences other jurors prior to deliberation or at deliberation the theory of each juror being supreme on the facts or judges of the facts or weighing only the evidence should be scrupulously observed.

The "U. S. v. Ellenbogen" case which is cited by the Solicitor General deals with a juror who became ill and on the 4th day of trial was replaced by an alternate. Concededly there could be no showing of prejudice however the case at bar differs in all respects.

a) The jurors were having a "Roman Holiday" at trial counsel's expense—Noticed by all attorneys.

b) Two letters were sent to the judge regarding counsel.

c) The Court would not permit any showing of prejudice, short circuited any examination of juror #9 to show prejudice of other jurors.

d) The Court admitted that other jurors could well have the same opinion which illustrates possible ineffectual representations of the defendant.

e) The court again was in error when it stated that the voir dire of juror #9 would take place in front of the entire jury.

Naturally a hearing on juror #9 would be held outside the presence of the jury and findings of facts could have been rendered. At worse this matter could have been concluded in 1 hour or 2 hours rather than continued for a further 2½ weeks of a trial already concluded in the minds of the jury.

In *United States* v. *Virginia Erection Corporation,* 335 F. 2d 868, 872-873, mistakenly reported in petitioner's brief as *Johnson* v. *U. S.,* 335 F. 2d 873, 876, was reversed and remanded for a new trial. In *Virginia Erection* case the alternate was permitted to remain in the jury room during deliberation and although mute his presence apparently was considered a contamination of the Jury's deliberation as well as the comments of another Juror, Miss Furr who was interrogated in chambers in the presence of all counsel, the court reporter, a deputy marshall and a notary public.

Had the Trial Court permitted a hearing on Juror #9 as insisted by counsel not only prejudice could have been shown but *contamination.* Absent a hearing there is absent a showing therefore the issue was not met by the trial or appellate courts to date as to whether the Jury had already made up their minds as to the ultimate verdict in the case.

As to Point 2 a "rogue gallery." picture of the defendant shown to agent Murphy while on the stand, the prosecutor walked to the witness chair and in the presence of the Jury some 2 feet away showed a picture of the defendant to the agent, asked him to identify same which he did as the picture of the defendant and then the further question of *how could he be sure* answered in a clear loud voice to the Jury:

> "A. The picture on the reverse side has Exhibit 2. 6/6/61. It also has in type Leonard Aiken, Federal Fugitive, Custom Depot Finbair J. Murphy, day phone Watkins 4-3000 Extension 231. Night: Whitehall 4-3000. Ask for me."

The implications are clear that the defendant had been sought for 5 years; he was now caught, he was dangerous as the Government had a night and day phone on him and that he was a fugitive. This was planned by the witness and the prosecutor and insisted upon as part of the trial strategy.

This picture was not introduced as laying a foundation for the introduction of a number of government exhibits but was deadly calculated to end any trial in the minds of the jurors and to point irresistibly to the guilt of the defendant.

The fact that the picture was not introduced into evidence indicates not only that it was unnecessary and therefore deliberate but further that the failure to introduce it into evidence was but a design. The damage and overwhelming prejudice had been done by agent Murphy's

answer, a purposeful and calculated effort to do more than impugn the petitioner's character; *impute his guilt.*

The side bar conference on the picture only emphasized its importance with the hush hush and secrecy surrounding the picture.

The statement by the original prosecutor that the "picture" incident was inadvertence; by the Appellate Court's opinion below that it was unfortunate; and by the Solicitor General that the question went into more detail than was necessary is a confession of serious prejudice to the defendant. The trial was over at that point for the defendant 2½ weeks prior to deliberation.

To say that these errors which are conceded were harmless in the context of the whole trial is comparable to saying that after a fighter is flattened to the canvas by his opponent for the count of ten he is then taken back to his corner, revived and then the fight is resumed and carried to the end that the fighter can now hopefully await the verdict of the referee and judges.

In *United States* v. *Harman,* 349 F. 2d 316, which petitioner cites and which was reversed on pictures alone there is here in the case at bar a stronger error, an oral answer that the defendant was a federal fugitive for 5 years contact Federal Agent Murphy day or night by calling a certain telephone. Here was a picture with an answer combining the visual with the oral.

Aiken's character was not in issue nor was his credibility open to attack. Aiken did not take the stand.

U. S. v. *Tomaiolo,* 249 F. 2d 683 (2nd Circuit—1957); *Tallo* v. *United States,* 344 F. 2d 467.

". . . See Wigmore [on evidence, McNaughton Revision 1961] § 2243, page 259 . . . as long as the privilege is recognized it ought not to be substantially undermined

by permitting in connection with its exercise, the usual inference with respect to the failure to produce available evidence."

From all the circumstances surrounding the picture incident to the point of reference by the Prosecutor when a question of identification arose as a John Doe a/k/a Leon where there were two Leon's in this case; one Leon Schoolboy Ellis who had confessed his guilt and was a government witness and who answered to the description a negro male of medium complexion, with black hair and a medium build, approx. 40 years old, approx. 5' 9" tall and weighing approx. 165 lbs. which was set out in the caption of the indictment and the defendant, Leon Royall Aiken, who had more identifying features than set out above and who did not answer to the weight or height features a serious invasion of the privilege against self incrimination focused.

As the defendant rose from his seat to confront his accuser, one Coulson, then on the witness stand for the Prosecution, the Prosecutor in the presence of the Jury declared as he looked at Aiken "I think he can do that when he takes the stand and testifies", and again turning to the defendant Aiken said *"If this man is going to testify let him get on the stand and say he saw him."* (Tr. 557)

2 weeks later the Court stated that the defendant need not take the stand and no inference could be raised by his failure. Of course this was to little and too late to cure the dramatic shattering effect of this and the picture incident on the Jury.

In both instances the answers were not stricken from the record nor proper curative instructions attempted even in the Court's charge. *U. S.* v. *Duff*, C. A. 6 1964, 332 F. 2d 702; *Alexander* v. *U. S.* (1965), 354 F. 2d 59 (Reversed).

Four other points advanced in petitioner's main brief are submitted in opposition to the Solicitor General's main brief and the points and arguments as set forth in the Maxwell brief are incorporated as though fully contained herein.

It is respectfully submitted that the petition for a Writ of Certiorari should be granted.

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